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ABSTRACT

Three separate newsletter issues examine the issue of sexual harassment on college campuses. Part I contains a general introduction to the topic and two articles. The first of these discusses the definition of sexual harassment by the United States Equal Employment Opportunity Commission (EEOC) and the courts, the EEOC guidelines on conduct of a sexual nature that may constitute sex discrimination in employment, and developing federal and state court standards of legally actionable workplace sexual conduct for both quid pro quo and hostile environment type harassment. A selected bibliography lists 11 references concerning sexual harassment in employment. Part II also contains two articles. The first of these focuses on prevention and detection and urges employers to reduce their risks of being subject to sexual harassment complaints by taking affirmative steps to eliminate sexual harassment at the workplace. The article also discusses the legal requirements for employment policies and procedures that address sexual harassment and gives a point-by-point description of a seven-point program for preventing and detecting such harassment. The second article looks at ways faculty unions can respond to issues of sexual harassment. Part III includes articles on the increasing tort liability associated with sexual harassment complaints and the new legal remedies available to sexual harassment complainants following the recent enactment of the Civil Rights Law of 1991. References accompany most articles. (GLR)

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Sexual Harassment, Parts I, II, and III

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SEXUAL HARASSMENT: PART I

Editor's Note: Title VII of the Civil Rights Act of 1964, as amended, makes unlawful conduct that discriminates against an individual in his or her employment on the basis of sex. Sexual harassment is recognized by the Equal Employment Opportunity Commission and the courts to be a form of sex discrimination. At a seminar on sexual harassment held at Baruch College on February 26, 1992,' speakers addressed such topics as: what constitutes sexual harassment under the law; policies and procedures to prevent sexual harassment; legal issues related to an internal investigation of a sexual harassment complaint and legal remedies available to employees who allege that they have been sexually harassed.

NCSCBHEP will publish edited texts of presentations by seminar speakers in the Newsletter in three parts. Part I (Vol. 19, No. 3) covers sexual harassment as defined by the EEOC and the courts, Part II (Vol. 19, No. 4) discusses policies and procedures that should be implemented by institutions to prevent sexual harassment and Part III (Vol. 20, No. 2) will cover internal investigations of complaints of sexual harassment and legal remedies available to sexual harassment complainants.

The seminar was held subsequent to the date of publication of this Newsletter.

SEXUAL HARASSMENT DEFINED

Introduction

A major automobile manufacturer in the United States reported significant fourth-quarter profit losses for 1991 but a sharp increase in sexual harassment complaints for the same period. While there is obviously no correlation between the profit losses and the sexual harassment complaints, it is a sad commentary that after two decades of legislation prohibiting sex discrimination in employment, a major U. S. employer has not achieved effective prevention programs that would eliminate the need for such complaints. From Shakespeare's Portia's having to disguise herself as a male in order to argue at the bar to Victor Hugo's Fantine's being dismissed from her job for refusing her forman's requests for "favors" to the EEOC's Anita Hill's airing her grievances on television, discrimination in employment on the basis of sex is nothing new and has not yet grown old. What we hope, however, is that it is not here to stay.

Discrimination in employment on the basis of sex is prohibited by Title VII of the Civil Rights Act of 1964, as amended. Since the enactment of Title VII, sexual harassment as a form of sex discrimination has matured as a cause of action with a pivotal point of its maturity being the U.S. Supreme Court's definitive finding of actionable "hostile environment" type sexual harassment in Meritor Savings Bank v. Vinson.

The EEOC and the courts have been clear in determining that not all conduct of a sexual nature at the work place constitutes sexual harassment. The EEOC and the courts, however, have been struggling with defining parameters of conduct that does constitute sexual harassment, the difficulty of definition being attributable to the multiple variables of human action, perception and response. The following two articles -- "What Constitutes Sexual Harassment Under the Law: An Overview" by Laurie Berke-Weiss and "Emerging Issues in Hostile Work Environment Sexual Harassment" by Louis Pechman -- provide an overview of EEOC guidelines and court decisions that bring into focus conduct of a sexual nature that defies reasonable behavior at the work place and which constitutes legally cognizable discrimination on the basis of sex.

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WHAT CONSTITUTES SEXUAL HARASSMENT UNDER THE LAW: AN OVERVIEW

by Laurie Berke-Weiss*

Title VII of the Civil Rights Act of 1964,[1] first defined "sex" as a protected class. Subsequently, the Equal Opportunity Commission's 1980 Guidelines,[2] and case law, effectively extended the Act's protections to claims of sexual harassment.

My focus is on the protections offered by Title VII. Employees, however, have other vehicles for making sexual harassment claims, including state statute and local law, as well as common law claims such as assault, battery, intentional infliction of emotional distress and slander. Colleges and universities may also face charges raised under Title IX of the Education Act[3] and, in the case of public institutions, claims may be raised based on 42 U.S.C. § 1983, claiming a violation of the equal protection clause of the Constitution.

Recently, the Civil Rights Act of 1991[4] made significant amendments to Title VII. Previously, a claimant seeking compensatory, nominal and punitive damages for discrimination based on sex, had to look beyond Title VII, which limited damages to actual loss of pay. Because claims of harassment are often characterized by no loss of tangible job benefits, plaintiffs had little economic incentive to commence suit under the Act. Now, however, plaintiffs who successfully allege sex discrimination can obtain compensatory, nominal and punitive damages under Title VII. Another change is the availability of a jury trial for claims of discrimination based on sex. Thus, the 1991 Act has added monetary incentives for making a claim of sexual harassment, thereby raising the stakes for the complainant as well as the employer.

The Guidelines

The EEOC Guidelines define sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal and physical conduct of a sexual nature when:

1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

2. submission to or rejection of such conduct by an individual is used as the basis of employment decisions affecting the individual; or

3. such conduct has the purpose or effect of (i) interfering unreasonably with an individual's work performance or (ii) creating an intimidating, hostile, or offensive working environment.

Thus, the Guidelines identify two situations in which unwelcome sexual conduct may constitute a cause of action for sexual harassment. The first, *"quid pro quo"* conduct, is usually easy to recognize. It's the casting couch, the promise of gain or threat of loss of employment, or a benefit of employment tied to providing sexual favors to a supervisor. Once an employee proves her *prima facie* case, that the *quid pro quo* has occurred, her employer is strictly liable for the wrong, whether or not it knew or could have known of the objectionable conduct.

The second, or, "hostile environment" type of harassment may not be as easy to identify. Hostile environment cases have arisen from a variety of complaints, including use of sexually charged language; being touched by a supervisor or fellow employee; being subjected to sexual innuendo or graffiti; being exposed to sexually explicit posters in the workplace; being subjected to unwelcome kissing; and sexual assault. Claims of *quid pro quo* and hostile environment harassment need not be mutually exclusive.

The Guidelines also recognize that a hostile work environment is created where there is widespread favoritism. In one well-known case involving an office of the Securities and Exchange Commission, Broderick v. Ruder,[5] a hostile environment was held to exist where the plaintiff, a staff attorney, and other female employees, were forced to work in an atmosphere where managers and supervisors bestowed preferential treatment upon those who submitted to their sexual advances.

As an aside, although here and throughout this presentation you will hear the employee identified as a female, and while, in most cases, the complainant is a female employee, courts have credited claims of

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unwelcome homosexual advances. Complaints by male employees based on claims of harassment by females are also possible under the Guidelines.

Hostile Environment Claims

The Eleventh Circuit, in Henson v. City of Dundee,[6] set forth five elements a plaintiff must allege and prove in order to establish a claim of hostile environment sexual harassment:

1. The employee belongs to a protected group.

2. The employee was subject to unwelcome sexual harassment, with "unwelcome" defined as conduct "the employee did not solicit or incite... and ...that the employee regarded the conduct as undesirable and offensive."

3. The harassment complained of was based upon sex. That is, the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment.

4. The harassment complained of affected a "term, condition or privilege" of employment. "For sexual harassment to state a claim under Title VII, it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment."

5. *Respondeat superior.* The plaintiff must show that the employer knew or should have known of the harassment in question by her supervisor or co-worker and failed to take prompt remedial action. This element distinguishes hostile environment from *quid pro quo* situations.

While these elements sound straightforward, they contain ambiguities reflected in the case law. For example, identifying a "protected group" usually means female employees, but cases have held that females may not be protected in a rough hewn work atmosphere where salty language may be the norm. Similarly, the second element, "welcomeness", also becomes blurred when the complainant participates in sexual conduct. However, courts, notably the Supreme Court in Meritor Savings Bank v. Vinson,[7] which I will discuss in a moment, have found that participation does not automatically demonstrate welcomeness.

The third element requires plaintiff to prove, for example, that sexually charged epithets or the presence of pin-ups in the workplace were directed at her, as a woman. In other words, to satisfy this element, a sexual context for crude behavior must be established. The fourth element requires that the complainant demonstrate that the harassment actually affects her conditions of employment, Finally, the fifth element, *respondeat superior* places the burden of complaint on the plaintiff if the harassment is not readily apparent.

Meritor Savings Bank v. Vinson

The unanimous 1986 decision of the Supreme Court in Meritor Savings Bank v. Vinson endorsed the Henson five element test. It solidified the law of hostile environment by holding that an employer may be liable where sexual harassment by a supervisor creates a hostile working environment, and that a plaintiff's submission to sexual advances will not bar a discrimination claim if, in fact, the relationship was an unwelcome product of workplace coercion.

Vinson met Sidney Taylor, a vice president of Meritor Savings Bank, and through him, applied for and was hired by the Bank as a teller-trainee. She worked at the same branch for four years until her discharge. Subsequently, Vinson brought an action against Taylor and the Bank claiming that during her tenure there Taylor had constantly subjected her to sexual harassment.

The alleged harassment began with an invitation to dinner after Vinson's probationary period. At dinner, Taylor suggested they go to a motel to have sexual relations. Initially Vinson refused, but later, out of fear of losing her job, she agreed. Vinson alleged that thereafter Taylor made repeated demands upon her for sexual favors. She estimated that she had intercourse with him 40 to 50 times over the next several years. Vinson testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and forcibly raped her on several occasions.

Taylor denied these accusations and contended that Vinson made them up in response to a business-related dispute.

After trial, the District Court concluded that Vinson was not the victim of sexual harassment. On appeal, the District of Columbia Circuit decided that the District Court had not considered whether a "hostile environment" violation had occurred, and it concluded that a remand was necessary. The Supreme Court agreed, noting that the District Court erroneously focused on the "voluntariness" of Vinson's sexual

relationship with Taylor. To quote the Court, "The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."

The Court instructed the District Court, that on remand, evidence of a complainant's sexually provocative speech or dress is relevant to "determining whether she found particular sexual advances unwelcome." It noted that the "Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of circumstances,' such as the nature of the sexual advances and the context in which the alleged incidents occurred."

Examples of Hostile Environment Cases

A court may find hostile environment harassment based on a single act, but generally, repeated incidents create a stronger claim of hostile environment with the strength of the claim depending on the number of incidents and the intensity of each incident. Since the Vinson decision, hostile environment cases have addressed a wide variety of claims.

For example, the Ninth Circuit found love letters from a co-worker to be actionable in Ellison v. Brady,[8] in Carrero v. New York City Housing Authority,[9] the Second Circuit was not convinced that an immediate supervisor's behavior -- two kisses, three arm strokes, several degrading epithets and other objectionable conduct -- was trivial, and found that a hostile environment existed; in Watts v. New York City Police Department,[10] the Southern District of New York rejected the employer's motion for summary judgment, finding that two sexual assaults in a three-day period, one threat and ostracism for complaining of harassment stated a hostile environment claim; and, the Ninth Circuit, in EEOC v. Hacienda Hotel,[11] found sexual harassment where a supervisor frequently witnessed and laughed at vulgarities, sexual remarks and requests for sexual favors from the chief of engineering. In a 1990 decision of the Southern District of New York, Dana v. New York Telephone Company,[12] the court determined that sexually explicit graffiti and a co-worker's lewd comment constituted a hostile environment.

In contrast, are those cases which have found no hostile environment, even where there is sexually-oriented workplace conduct. For example, in Koster v. Chase Manhattan Bank,[13] the Southern District of New York found no hostile environment or *quid pro quo* harassment where plaintiff's affair with a supervisor was welcomed. Courts, notably the Sixth Circuit in Rabidue v. Osceola Refining Co.,[14] also have found that in some environments, vulgar language and pin-ups simply come with the turf and do not create a hostile environment.

Examples of Sexual Harassment at the University

The university has not been immune to sexual harassment claims. For example, in Lipsett v. University of Puerto Rico,[15] the First Circuit determined that where a female resident in the surgery department was subjected to sexual nicknames, forced to eat and attend meetings in a room plastered with pin-ups, repeatedly told that women should not be surgeons, and was subjected to unwelcome sexual advances (at least some of which included the suggestion that submission would immunize her from the abusive atmosphere in the program), issues of fact were raised which could not be resolved by defendants' motion for summary judgment.

Jew v. University of Iowa

Similarly, Jew v. University of Iowa,[16] a 1990 case, illustrates how a successful hostile environment claim might arise in the context of an academic committee's decision not to promote a tenured faculty member to full professor particularly, where the decision is coupled with an administration's failure to provide a meaningful response to a sexual harassment complaint.

Professor Jean Jew was initially hired as a post-graduate associate in the College of Medicine's Department of Anatomy. Later, she was appointed an Assistant Professor, and then granted tenure as an Associate Professor.

As a protegee of Dr. John Williams, the Department Chair, Dr. Jew found herself in the thick of intra-departmental warfare. As a result, certain senior faculty took out their animus toward Dr. Williams by engaging in an all-out campaign of sexual harassment against Dr. Jew.

Even though there had never been a romantic or sexual relationship between Dr. Jew and Dr. Williams, for years, communications circulated in the department suggesting a sexual relationship between them, implying that she thereby had gained favorable treatment. At various times, she was also the object of sexually suggestive cartoons and pictures, locker room talk about her supposed relationship with Dr. Williams, and found herself referred to as a "slut" and a "whore".

Interestingly, in a separate state court action, an individual faculty member was found guilty of making various untrue, sexually denigrating statements about her. The jury awarded Dr. Jew actual and punitive damages.

When senior faculty were evaluating Dr. Jew's promotion, explicit sex-based graffiti about her appeared on the wall of the men's room in the department. When a committee of the department's full professors actually met to consider her promotion, faculty members who spearheaded and participated in the offensive conduct were among the members. They denied the promotion; their reasons were later found to be pretextual.

Following the denial, Dr. Jew met twice with university officials to voice her complaints, however, no investigative or corrective measures were taken until she lodged a formal complaint of sexual harassment through her counsel. Then, the university appointed a faculty investigative panel which concluded that the conduct had occurred and that the treatment which Dr. Jew experienced was harassment and was related to her sex. However, the panel took no corrective action and she commenced suit.

After trial, the court found that Dr. Jew had been harassed and discriminated against. The judge ordered that she be promoted to full professor effective the date she would otherwise have been appointed, with full back pay.

King v. Board of Regents of University of Wisconsin System

The Seventh Circuit reached a different conclusion in another 1990 case, King v. Board of Regents of University of Wisconsin System.[17] In King, an untenured assistant professor of occupational therapy sued the University and several of its employees when she was denied contract renewal and, in effect, tenure.

Ruling under § 1983, the Court upheld a finding of harassment against one faculty member who had behaved in a sexually suggestive fashion toward King over a protracted period of time. The Circuit upheld the dismissal of claims against the university which, unlike the situation in Jew, had responded to King's internal claim of sexual harassment by having the offending faculty member abstain from matters relating to her appointment. Thus, he did not participate in the tenure decision which precipitated the suit.

Conclusion

In conclusion, these cases illustrate the range of offensive conduct which can give rise to sexual harassment claims. The cases also serve to demonstrate that egregious facts, particularly when combined with an unresponsive administration, can be costly in dollar terms and lead the courts to intervene in university governance.

ENDNOTES

1. 42 U.S.C. § 2000e et seq.
2. 29 C.F.R. § 1604.11.
3. 20 U.S.C. § 1681 et seq.
4. Pub. L. No. 102-166, 105 Stat. 1071.
5. 685 F.Supp. 1269 (D.D.C. 1988).
6. 682 F.2d 897 (11 Cir. 1982).
7. 477 U.S. 57, 106 S.Ct. 2399 (1986).
8. 924 F.2d 872 (9th Cir. 1991).
9. 890 F.2d 569 (2d Cir. 1989).
10. 724 F.Supp. 99 (S.D.N.Y. 1989).
11. 881 F.2d 1504 (9th Cir. 1989).
12. 752 F.Supp. 594 (S.D.N.Y. 1990).
13. 687 F.Supp. 848 (S.D.N.Y. 1988).
14. 805 F.2d 611 (6th Cir. 1986). cert. denied, 481 U.S. 1041 (1987).
15. 864 F.2d 881 (1st Cir. 1988).
16. 749 F.Supp. 946 (S.D. Iowa 1990).
17. 898 F.2d 533 (7th Cir. 1990).

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EMERGING ISSUES IN HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT

by Louis Pechman*

Introduction

For most people, defining sexual harassment is -- if you will pardon the expression -- a straightforward proposition. It is akin to Supreme Court Justice Potter Stewart's statement on pornography that "I know it when I see it."[1]

And indeed, many cases of sexual harassment are obvious. Unwelcome kissing, pinching, sexual comments and the like fit neatly into our common notion of sexual harassment. The case law is replete with shocking behavior that men inflict on women in the workplace. A sampling of reported cases also makes clear, however, that there are no absolutes when it comes to defining sexual harassment, and that the proverbial "grey area" is getting larger.

My comments today will be directed to the significant factors which courts consider when examining claims of sexual harassment, particularly those alleging a hostile work environment.

Social Mores

One of the interesting problems in defining sexual harassment concerns the extent to which consideration should be given to the prevalent mores in society. Television, movies, magazines and newspapers are filled with sexually oriented topics. Moreover, dating in the workplace is not an uncommon phenomenon. For example, a recent issue of Cosmopolitan magazine contained a feature on "Love in Bloom ... in the Office!" The subcaption of the article announced "Romance on the job? Making an intimate business merger can be *fabulous* for your sex life and even your career!"[2]

In view of this backdrop, some courts have taken the position that it is unreasonable for employers, at the first instance, to have responsibility to censor or monitor workplace behavior between the sexes. Judge Edith Jones, dissenting in a Louisiana case involving International Paper, noted:

> We have so little social consensus in sexual mores nowadays that, short of incidents involving unwanted physical contact, it is impossible generally to categorize unacceptable sexual etiquette. It is likewise impossible to eradicate sexual conduct from the workplace -- without unthinkable intrusiveness.[3]

In the case before her, Judge Jones found it "incredible" that the majority opinion gave weight to the existence of sexual graffiti in determining whether an abusive work environment existed. According to Judge Jones:

> [S]exual mores in our society are in rapid flux. Depictions that were only recently regarded as taboo in movies and television are now *de rigueur* for programs that even children will watch. The public use of lewd and suggestive language is as commonplace on the playground as in the workplace. Against such trends, it is quaint but also naive to rule that employers are legally required to eradicate all sexual graffiti from their establishments.[4]

A similar approach was taken by the majority in the Sixth Circuit decision in *Rabidue v. Osceola Refining Corp.*,[5] a case which has provoked substantial controversy. In *Rabidue*, the Sixth Circuit found the constant anti-female obscenities of one employee and the posters of nude females displayed by numbers of male workers not to be hostile or offensive, in light of our "society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places."[6]

This approach did not sit well with dissenting Judge Damon Kieth. He stated:

> "Society" in this scenario must primarily refer to the unenlightened; I hardly believe reasonable women condone the pervasive degradation and exploitation of

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> female sexuality perpetuated in American culture. In fact, pervasive societal approval thereof and of other stereotypes stifles female potential and instills the debased sense of self worth which accompanies stigmatization. The presence of pin-ups and misogynous language in the workplace can only evoke and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy. That some men would condone and wish to perpetuate such behavior is not surprising . . . [given a] society, which at one point also condoned slavery.[7]

As these opinions illustrate, strong disagreement exists as to what impact the macro-view of society should have on the definition of sexual harassment.

Disagreement also exists in regard to the micro-view of a specific workplace. Should the determination of sexual harassment depend on either the lexicon of obscenity in a workplace environment or the reasonable expectation of a woman upon voluntarily entering that environment? In other words, should a female taking a position as a coal miner or truck driver have a different expectation of her environment then if she was working as a librarian? Moreover, is it realistic to place widely different corporate cultures -- or sub-cultures within an organization -- on the same plane when it comes to defining sexual harassment. Within the university setting, for example, should the same criteria govern the work environment of maintenance employees as governs that of professors?

From a plaintiff's perspective, these considerations unfairly require a woman to enter male dominated, abusive environments at their peril. From the employer's perspective, however, these considerations may merely reflect the reality of a given workplace.

For the most part, the lower courts have found that it is no defense to a sexual harassment charge to claim that a person should have known that she was entering an abusive environment. As the Fifth Circuit has pointed out in a case involving a steel mill:

> Work environments "heavily charged" or "heavily polluted" with ... sexual abuse are at the core of the hostile environment theory.[8]

Perspective for Assessing Sexual Harassment

The perspective from which the courts assess the pervasiveness and severity of alleged harassment is another issue critical to the determination of whether conduct constitutes sexual harassment. The alternative perspectives are that of (1) the harasser, (2) the reasonable person viewing the circumstances as a whole, or (3) the victim's perspective.

From the harasser's perspective, romantic intentions may be purely noble. The thought that he is harassing the object of his affection would likely strike him as implausible. Alternatively, a harasser who tells off-color jokes, posts a Playboy calendar and teases a co-worker in jest may be oblivious to the fact that he is engaging in prohibited harassment.

Discriminatory intent is, as the Supreme Court has stated many times in Title VII cases, the "ultimate question."[9] The noted treatise of Prosser on the Law of Torts also tells us that a person "intends" to cause a result "where a reasonable person in that person's position would believe that a particular result was substantially certain to follow."[10] Curiously, however, the courts seldom give weight to the intentions of the accused harasser in a sexual harassment case.

Courts have typically viewed claims of sexual harassment from the perspective of the reasonable person. More recently, some courts have adopted a reasonable woman approach. The importance of the standard is that claims which might not have sufficed under the reasonable person standard are actionable when viewed under the reasonable woman standard. *Ellison v. Brady*.[11] The *Ellison* case out of the Ninth Circuit is a perfect illustration. Under the reasonable person standard the lower court found the alleged harassment to be "isolated and generally trivial" but under the reasonable woman standard the Court of Appeals found that the plaintiff, Kerry Ellison stated a valid claim. Because the *Ellison* case is the leading decision on the "reasonable woman" standard it merits close examination.

Kerry Ellison, a revenue agent in the San Mateo, California, office of the IRS, went to lunch, innocently she thought, with Sterling Gray, another agent in the same office. Gray, however, saw the beginnings of a personal relationship, and began to "pester Ellison with questions and hang around her desk." He asked her to lunch two more times and once for an after work drink, but Ellison declined all these invitations and attempted to

keep away from Gray in the office. A week or so later, Gray left her a note which read:

> I cried over you last night and am totally drained today. I have never been in such constant turmoil.

Ellison became frightened and showed the note to her supervisor, Bonnie Miller, who said "this is sexual harassment." Ellison, however, decided she wanted to try to handle it herself and asked Miller not to do anything. Instead, Ellison asked a male co-worker to tell Gray to leave her alone.

Ellison then left for four months' training in Missouri. While there, she received a card from Gray which said:

> I know that you are worth knowing with or without sex . . . I have enjoyed you so much over these past few weeks. Watching you. Experiencing you so far away. Admiring your style and elan . . . I will write another letter soon.

After this note, Ellison "thought Gray was crazy" and "didn't know what Gray would do next." Ellison immediately reported the note to Miller. In turn, Miller told Gray later that same day to leave Ellison alone.

Gray was then transferred to San Francisco but filed a union grievance demanding to go back to San Mateo. The IRS agreed to let him return in four months if he promised to stay away from Ellison. Ellison became "frantic" when she found out that Gray was moving back to the same office, asked to transfer to San Francisco if Gray returned to San Mateo, and filed a sexual harassment lawsuit against the IRS.

As I noted earlier, the district court dismissed Ellison's complaint because it found that Gray's overtures were "isolated and generally trivial." The Ninth Circuit disagreed, observing that "women who are victims of harassment may understandably worry whether it is a prelude to violent sexual assault." The court reinstated Ellison's complaint, ruling that an analysis of sexual harassment should focus on "the perspective of the victim," because "even well-intentioned men may not realize that their sexual overtures or comments may offend and threaten women." The Ninth Circuit noted that conduct men consider "normal" may offend many women, and that even the sex-blind "reasonable person" test "tends to be male-biased and systematically ignores the experience of women." The court concluded that the unique perspective of women must be taken into account if sexual harassment in the workplace is to be eliminated.

To shield employers from the "rare hypersensitive employee," the court said that the test in harassment cases is not how the individual plaintiff reacts, but whether there is an abusive work environment from the viewpoint of a "reasonable woman."

As applied to the facts before it, the court noted that Gray, after being asked to leave Ellison alone, had written her two more "passionate love letters," saying that he had been "watching" her and would write again. The court explained that while from the harasser's viewpoint, Gray could be portrayed as a modern-day Cyrano de Bergerac wishing no more than to woo Ellison with his words, a reasonable woman could find that these actions had created a threatening work environment for Ellison.

Male v. Female View

The reasonable woman standard acknowledges that men and women have different views about what constitutes harassment. The court in *Robinson v. Jacksonville Shipyards Inc.*,[12] a Florida case which applied the reasonable woman standard noted:

> Men and women respond to sex issues in the workplace to a degree that exceeds normal differences in other perceptual reactions between them. For example, research reveals a near flip-flop of attitudes when both men and women were asked what their response would be to being sexually approached in the workplace. Approximately two-thirds of the men responded that they would be flattered; only fifteen percent would feel insulted. For the women, the proportions were reversed.

A similar observation was made in a study by Michelle Paludi, a psychologist at Hunter College. The study was reported in the New York Times when the Anita Hill/Clarence Thomas controversy was going on.

In Paludi's study men and women in college were presented with hypothetical scenarios and asked to say when sexual harassment occurred. In one scenario, a woman gets a job teaching at a university and her department chairman, a man, invites her to lunch to

discuss her research, but instead delves into her personal life. After a few such lunches, he invites her to dinner and then for drinks. While they are having drinks, he tries to fondle her. according to Paludi, most of the women said that sexual harassment started at the first lunch when he talked about her private life instead of her work. Most of the men said that sexual harassment began at the point he fondled her.

The reasonable woman standard is likely to provoke sharp controversy as it is applied to the determination of "unwelcomeness" in hostile environment cases. The Supreme Court in *Meritor Savings Bank v. Vinson*[13] explained that the "correct inquiry" for a sexual harassment case is whether the victim "by her conduct indicated that the alleged sexual advances were unwelcome." This statement seems clear enough but how exactly does an employer determine that a victim did not desire that the conduct take place, particularly from the reasonable woman's perspective?

If a victim tells the harasser to stop, threatens to make a complaint, or actually makes a complaint, it is obvious that the conduct is unwelcome. However, consider for a moment the range of other possibilities. A victim may deny the impact of the event and block it out, avoid the harasser -- or the workplace -- by taking sick leave or disability leave, or participate in the joking or sexual banter to diffuse the situation.

Where the victim has participated in vulgarity and sexual jokes in the workplace or has delayed in reporting the allegation of harassment the courts have generally held victims to a higher standard for establishing "unwelcomeness."[14] The EEOC seems to be in accord with this approach, suggesting that one of the key questions to be explored in a hostile work environment claim is "did the charging party participate?"[15]

This traditional view that sexual harassment is not "unwelcome" if either the victim does not protest or participates in the sexual banter may be disfavored under the reasonable woman standard since it does not take into consideration the continuum of reactions that a woman may have to harassment. This issue bears close examination in the coming years.

Jury Trial

It is important to keep in mind that with the passage of the Civil Rights Act of 1991, sexual harassment cases will now be heard by juries rather than judges. The right to a jury trial means that except for the very limited situation where a fact pattern is so weak that a judge determines that no reasonable jury could possibly find for the plaintiff, the jury will define sexual harassment in any given case.

What is the implication of the jury trial? If you represent employers, you might tend to agree with Mark Twain's statement:

> The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury.[16]

If you represent employees, you would more likely agree with Benjamin Cardozo's view:

> Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them.[17]

Whatever your opinion is of the jury system, sexual harassment will now be defined by those individuals sitting in the jury box. A common refrain which will now be repeated by plaintiff counsel to employer counsel and from employer counsel to their clients, is that when you go before a jury anything can happen.

While the parameters of the sexual harassment inquiry -- for example, whether the standard will be reasonable person or reasonable woman -- will still be set by the court, juries will have wide latitude in resolving issues of fact. Whether a look is a leer, or a request for a date is coercive, or dirty jokes are unwelcome will all be questions of fact for the jury.

Conclusion

In conclusion, a confusing picture has emerged for employers who seek to identify hostile work environment sexual harassment. This lack of clarity, however, is manageable. It must be remembered that to state a *prima facie* hostile environment case, a plaintiff must show that the employer knew, or should have known, of the harassment and failed to take remedial action.[18]

This element is the legal equivalent of an safety net for employers. Even if harassment occurs, it can be cured and liability may be avoided if the employer has an effective sexual harassment policy and appropriate action is taken once harassment occurs. Before facts turn into a court case, an employer has the unique

opportunity to view the circumstances from the reasonable person perspective, the reasonable woman perspective, from the harasser's perspective and, most importantly, from the victim's perspective. With that information, an informed, well-measured response to allegations of harassment may be made.

ENDNOTES

1. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).
2. Wright, "Love in Bloom...In The Office," Cosomopolitan, November, 1991.
3. Waltman v. International Paper Co., 875 F.2d 468, 484 (5th Cir. 1987).
4. Id. at 486.
5. 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987).
6. Id. at 622.
7. Id. at 627.
8. Wyerick v. Bayou Steel Corp., 887 F.2d 1271, 1275 (5th Cir. 1989).
9. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
10. Prosser, Handbook of the Law of Torts, p. 32 (West Publishing Co., 4th Ed. 1971).
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12. 760 F.Supp 1486 (M.D. Fla. 1991).
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15. EEOC Policy Guide, March 19, 1990.
16. Twain, Roughing It, p. 57 (P.F. Collier and Son Co. 1913).
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18. See, e.g., Rabidue, supra, at 621.

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SEXUAL HARASSMENT: PART II

SEXUAL HARASSMENT: PREVENTION AND DETECTION

by Leona L. Barsky, Esq.*

Editor's Note: Sexual Harassment: Part I (Newsletter, Vol. 19, No. 3) contained articles on the "definition" of sexual harassment by the United States Equal Employment Opportunity Commission ("EEOC") and the courts. EEOC guidelines on conduct of a sexual nature that may constitute sex discrimination in employment and federal and state court developing standards of legally actionable workplace sexual conduct were discussed for both *quid pro quo* and hostile environment type harassment.

Sexual Harassment: Part II (Newsletter, Vol. 19, No. 4) outlines methods for employers to reduce their risks of being subject to sexual harassment complaints by taking affirmative steps to eliminate sexual harassment at the workplace. In Sexual Harassment: Prevention and Detection, Leona L. Barsky discusses legal requirements for employment policies and procedures that address sexual harassment and introduces a seven point program for employers to design and communicate to their employees effective policies against sexual harassment.

Sexual Harassment: Part III (Newsletter, Vol. 20, No. 2) will include articles on the increasing tort liability associated with sexual harassment complaints and the new legal remedies available to sexual harassment complainants following the recent enactment of the Civil Rights Law of 1991.

Articles on sexual harassment published in the Newsletter were written from presentations by the authors at a seminar on sexual harassment held at Baruch College on February 26, 1992.[1]

[1] The seminar was held subsequent to the date of publication of this Newsletter.

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I. Introduction

Even though Title VII has barred sex discrimination in the workplace for over twenty-five years, employers are still faced with the problems of improper and impermissible sexual advances, touching and comments in the workplace. With the recent controversy over the Clarence Thomas nomination and the changes implemented by the Civil Rights Act of 1991, employers are becoming increasingly concerned with the prevention and detection of sexual harassment in the workplace. Employers and employees learned at least one lesson from the Clarence Thomas nomination hearings -- sexual harassment is an old misunderstood problem that is still with us.

Employers are currently facing widespread confusion over the type of behavior that is acceptable in the workplace. The confusion stems from the tendency of employees to carry over sexually-oriented behavior from social settings to the workplace without an acknowledgement of the different environments and an understanding of the consequences. In light of the developing case law and the increasing publicity about "office romance," employers need to be more diligent about creating a work environment inhospitable to the casual suggestive comments, the consistent inquiries into personal and intimate activities, the remarks about appearance and dress, and the touching of another employee which extends beyond the mere handshake. To create a harassment-free work environment, employers need to recognize that sexually-oriented behavior which makes employees uncomfortable, even if

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seemingly innocent and de minimis, should be addressed and eliminated.

By implementing a seven point program aimed at preventing and detecting sexual harassment in the workplace, employers can establish policies and procedures which will discourage harassing conduct, comply with the rapidly evolving law on sexual harassment, build employee morale and improve job performance and, at the same time, minimize potential liability and the likelihood of costly and time consuming litigation.

II. Legal Requirements for Sexual Harassment Policies and Procedures

In 1980, the Equal Employment Opportunity Commission ("EEOC") issued its regulations on sexual harassment announcing that "prevention is the best tool for the elimination of sexual harassment."[1] The EEOC imposed an affirmative duty on the employer to "take all steps necessary to prevent sexual harassment from occurring" including (i) expressing strong disapproval of sexual harassment, (ii) developing appropriate sanctions, (iii) informing employees of their right to raise and how to raise the issue of sexual harassment, and (iv) developing methods to sensitize employees.[2]

The Supreme Court in its first and only sexual harassment case to date -- Meritor Savings Bank v. Vinson -- decided in 1986 -- evaluated an employer's policy and procedure on sexual harassment.[3] The Supreme Court declined to issue a definitive rule on employer liability for hostile work environment sexual harassment, but cited the EEOC's suggestion that an employer would be insulated from liability if the employer had an express anti-harassment policy and a reasonably available and responsive complaint procedure, and did not know about the alleged harassment.[4] The Court noted that a complainant's failure to notify the employer does not necessarily insulate the employer from liability.[5]

On the basis of the facts before it, the Court found the employer's generalized nondiscrimination policy and the complaint procedure insufficient to ensure against liability. The nondiscrimination policy did not specifically address sexual harassment and the complaint procedure began with the supervisor who, in this case, was accused of sexual harassment.[6]

In 1990, the EEOC issued revised policy guidance on sexual harassment for its field personnel.[7] This policy guidance provides helpful descriptions of appropriate preventive and remedial steps. The EEOC's policy guidance describes the elements of a prevention program which consists of a policy, a complaint procedure and communications with employees. According to the EEOC, the employer should have an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented, and a complaint procedure "designed to encourage" employees to make complaints.[8] The procedure should allow employees to complain to someone other than the immediate supervisor, ensure confidentiality to the extent possible, provide effective remedies and protect employees from retaliation.[9] The employer should discuss the subject of sexual harassment and the policy with employees, express strong disapproval and explain the sanctions for violations of the policy.[10]

According to the EEOC, the employer has an affirmative duty to investigate complaints and remedy known sexual harassment.[11] The employer should, therefore, promptly and thoroughly investigate when it receives a complaint or otherwise learns about alleged sexual harassment. The employer's remedial actions should include immediate and appropriate steps to end the harassment, prevent the harassing conduct from reoccurring, restore lost employment opportunities or benefits to the alleged victim and take disciplinary action against the alleged offender, if warranted, as a result of the investigation.[12] The EEOC will close a sex discrimination charge and take no further action if its investigation establishes that the employer eliminated the sexual harassment, made the alleged victim whole and instituted preventive measures.[13]

Recent judicial decisions illustrate some of the ineffective and inappropriate preventive and remedial steps taken by employers to combat sexual harassment. For example, the courts have concluded that preventive and remedial steps were defective where (i) an employer failed to implement its policy on sexual harassment,[14] (ii) an employer failed to conduct a thorough and comprehensive investigation of a sexual harassment complaint,[15] (iii) an employer provided a slow and ineffectual response to a sexual harassment complaint,[16] (iv) an employer failed to sanction an employee who was found to have engaged in sexual harassment,[17] and (v) an employer failed to prevent repetition of the sexually harassing conduct by the same offender.[18]

One case in particular provides a graphic example of ineffectual preventive and remedial actions taken by an employer. Last year, the court, in Robinson v. Jacksonville Shipyards found that a female welder had

been exposed to a hostile work environment in a shipyard consisting of repeated sexual jokes and comments, rampant sexually-oriented pictures, pinups and calendars and rejection by her male coworkers.[19] The court found that the employer's sexual harassment policies and complaint procedures and its responses to complaints from the plaintiff and other women workers were totally ineffectual.

The employer's first policy on sexual harassment was adopted in 1980 and stated that suggestive remarks, physical advances or intimidation would not be tolerated. The policy instructed employees to bring complaints to the EEO coordinator and was posted in the shipyard.[20] The court found that the policy was ineffective because it did not provide the identity of the EEO coordinator and was not distributed in the same manner as other company policies.[21]

The employer's second policy on sexual harassment was adopted in 1987 while the lawsuit was pending and included specific definitions of sexual harassment, identified one employee to receive complaints and promised an immediate investigation of complaints and the imposition of sanctions on offenders.[22]

The court found that the second policy was ineffective because it did not identify alternative employees to receive complaints and it was not included in the employee manuals, the affirmative action plan or the EEO poster.[23] The court was concerned with the lack of sexual harassment training for managers, supervisors and employees and concluded that all employees lacked the understanding necessary to implement and comply with the policy.[24]

The court focused on the inadequacies of the employer's responses to complaints about sexual harassment. The court determined that the employer had failed to take the complaints seriously, to conduct thorough investigations, to impose discipline consistent with the seriousness of the offenses, to document and maintain records about the complaints, and to prevent repetition of the sexually harassing conduct.[25] The court concluded that the employer's handling of complaints deterred employees from reporting incidents and prevented the employer from analyzing the level of sexual hostility in the workplace.[26] The employer's defense of lack of knowledge about the hostile work environment was rejected because the court found that the employer had "received actual knowledge of the state of the work environment, but, like an ostrich, . . . elected to bury its head in the sand rather than learn more about the conditions to which female employees . . . were subjected."[27]

In light of the employer's history of condoning sexually harassing conduct and failing to redress complaints, the court ordered the employer to adopt a policy and procedure substantially in the form proposed by the plaintiff and the NOW Legal Defense and Education Fund which had assisted the plaintiff with her lawsuit.[28] The policy consists of five sections which are described briefly.

The first section entitled "Statement of Policy" contains an introduction, general policy statement and the legal definition of sexual harassment. The second section entitled "Statement of Prohibited Conduct" lists specific examples of prohibited conduct. The third section entitled "Schedule of Penalties for Misconduct" contains a list of specific penalties geared to the nature of the offense and the status of the offender. The fourth section entitled "Procedures for Making, Investigating, and Resolving Sexual Harassment and Retaliation Complaints" identifies a number of employees to receive complaints and conduct investigations, details the investigative process and provides confidentiality assurances. The fifth section entitled "Procedures and Rules for Education and Training" explains the dissemination of the policy and the training and education programs for managers and supervisors, investigators and rank and file employees.[29]

The Jacksonville Shipyards decision provides employers with an example of a comprehensive policy which can be used as a model for designing policies that are more explicit and effective. Employers should note, however, that this policy contains some provisions which are more appropriate for supervisory guidelines than a generally disseminated policy and certain punitive provisions which are designed explicitly to remedy the hostile work environment at the shipyard.

III. Seven Point Program for Preventing and Detecting Sexual Harassment in the Workplace

By implementing the following seven point program, your organization can be in the forefront of efforts to combat sexual harassment in the workplace and avoid costly mistakes. The seven point program consists of (1) top management support for a strong stance against sexual harassment, (2) managerial and supervisory accountability for a harassment-free work environment, (3) a clear written policy specifically prohibiting sexual harassment, (4) an effective complaint

procedure, (5) communication and dissemination of the policy and complaint procedure as well as the message that sexual harassment will not be tolerated, (6) the training and education of managers, supervisors, the designated investigators and rank and file employees; and (7) prompt and effective responses to complaints and consistent implementation and enforcement of the policy.

A. Top Management Support for a Strong Stance Against Sexual Harassment

As a first step, enlist the support of top management for the campaign against sexual harassment. Top management should be willing to send the message that sexual harassment in any form will not be tolerated and that sanctions will be swift and serious. This support is crucial for the effectiveness of the policy and complaint procedure.

Top management needs to understand that the work environment should be free of the blatant forms of sexual harassment as well as the subtle forms such as sexual jokes and comments and sexually-oriented pictures. The expert on sexual harassment training and education for the plaintiff in Jacksonville Shipyards testified that:

> Management's perception concerning the scope and range of sexual harassment provides an important indicator of the hostility of the work environment. The more subtle forms of sexual harassment, such as sexual comments, sexual teasing and leering, often fall outside management's perception. As a general proposition, the higher an individual is on the management ladder, the more likely he is to regard sexual harassment as an exaggerated problem and the more likely he is to minimize complaints from women concerning what they perceive to be harassing behavior.[xx]

Top management might need to be convinced of the need for the campaign against sexual harassment. The human resources department can respond with information on the pervasiveness of the problem, including past complaints, and potential exposure, and obtain further information through informal surveys, questionnaires or interviews of employees.

B. Managerial and Supervisory Accountability for a Harassment-Free Work Environment

As part of its commitment to the campaign against sexual harassment, top management should make managers and supervisors accountable for maintaining a harassment-free work environment and implementing and enforcing the policy against sexual harassment. This accountability can be established through the supervisory guidelines, the communications to managers and supervisors, the training on sexual harassment and the evaluation of performance and the awarding of compensation based, in part, on successful efforts to prevent and detect harassment.

C. Clear Written Policy Prohibiting Sexual Harassment

The crucial part of the seven-point program is a clear written policy prohibiting sexual harassment in the workplace. The policy should contain the following information: (i) the purpose of the policy; (ii) the significance of the issue and the organizational philosophy on the issue; (iii) the legal and behavioral definitions of sexual harassment; (iv) how employees should handle sexual harassment; (v) the complaint procedure including the identity of several employees designated to receive complaints; and (vi) the description of the employer's response to complaints including the investigation and the discipline of offenders.

Prior to Jacksonville Shipyards, many employers used brief one-page sexual harassment policies that reiterated the legal definitions of sexual harassment, mentioned the complaint procedure, identified one or more employees to receive complaints, and stated that offenders will face disciplinary action, up to and including discharge. The Jacksonville Shipyards decision illustrates that a cursory sexual harassment policy is not necessarily adequate to insulate an employer from liability and to prevent and detect sexual harassment.

The policy should provide behavioral definitions of sexual harassment and illustrations which extend beyond the parameters for harassment under Title VII. Thus, the policy should mention that prohibited conduct includes, for example, sexual jokes, sexually-oriented pictures, abusive language, inquiries into personal and sexual activities, sexual teasing and ridicule, and leers. The behavioral definition sends top management's

message that the work environment should be free of inappropriate sexually-oriented conduct.

The policy should prohibit retaliation against employees for filing complaints, furnishing information or participating in an investigation in order to protect those employees who come forward. The policy should establish that managers and supervisors are responsible for preventing and detecting sexual harassment and are available to address employees' concerns.

The policy should be specifically tailored to the norms and environment of the workplace and consistent in style and format with other policies. It is not advisable to copy a policy from another employer or a judicial decision such as the Jacksonville Shipyards case. Investigators from the anti-discrimination agencies are interested in whether the employer has analyzed its policy on sexual harassment and actually adopted a policy which is appropriate and effective in the context of the organization.

D. Complaint Procedure

The complaint procedure is an essential element of the sexual harassment policy and should be designed to encourage employees to come forward with complaints. The policy should encourage employees subjected to sexual harassment to notify the offender that the behavior is unwelcome and to notify management. The policy should provide for the filing of complaints with a number of employees such as the human resources director or EEO manager, the immediate supervisor, the department head or any member of management. Employees who are witnesses to sexual harassment should also be encouraged to notify management.

The policy should provide a brief description of the investigative process, identify who will conduct the investigation and provide for the reporting of the result to the complainant and the alleged offender. The policy should provide confidentiality assurances to the extent practical and appropriate under the circumstances. The employer cannot provide absolute confidentiality guarantees because some limited disclosure of information will be made in connection with the investigation.

The policy should describe the range of disciplinary action and sanctions that will be taken against an employee who is found to have engaged in sexual harassment, such as counselling, mandatory attendance of sexual harassment programs, warning, suspension, demotion, denial of bonus, probation or discharge.

E. Communication and Dissemination of the Policy

As the court noted in Jacksonville Shipyards, the existence of a policy alone is not sufficient.[11] Employees have to know about and understand the policy. Communication and dissemination of the policy is, therefore, crucial. The policy should be signed by the appropriate individual and distributed to all employees with a cover memorandum from a member of top management, preferably the president. The policy should be periodically reaffirmed by the employer and reissued to employees.

The employer should distribute the sexual harassment policy in the same manner as the other policies and include the policy in the employee handbook. The policy should be posted on bulletin boards, given to new employees at orientation and periodically discussed at staff meetings. This constant communication, both written and oral, will send a message to all employees that sexual harassment is not condoned and that the complaint procedure is effective.

F. Training of Managers, Supervisors, Investigators and Employees

Employees' knowledge about and understanding of sexual harassment and the employer's policy on the issue is developed through training and education of employees. The training and education should, if possible, consist of separate programs for top level management, supervisors and other managers, the designated investigators and rank and file employees.

The presentation should be geared to the level of the employee and the goal of the program. All of the programs should cover basic topics such as the definitions of sexual harassment, the reasons for the concern about sexual harassment from the perspective of the organization and the individual employee and the steps that can be taken to combat sexual harassment.

The programs for supervisors, managers and rank and file employees should educate them about how to avoid harassing behavior and how to handle such behavior. The supervisors and managers need to understand the importance of avoiding and stopping subtle behavior such as comments and jokes that can create an unprofessional and sexually charged work environment. The expert on sex stereotyping for the

plaintiff in Jacksonville Shipyards explained that men and women respond differently to sex issues in the workplace. According to that expert, research has revealed that two-thirds of the surveyed men said that they would be flattered if they were sexually approached in the workplace while two-thirds of the surveyed women said that they would be insulted.[32]

The program for supervisors and managers should also cover appropriate responses to a sexual harassment complaint. For example, the untrained male supervisor would probably have one of the following responses when faced with a sexual harassment complaint from a female subordinate: (i) you are a big girl and can handle this on your own; (ii) make light of the complaint; or (iii) make some promise such as I'll talk to the offender and then fail to follow up.

The program can take many forms such as videos, lectures, group discussions and role playing and can be performed by employees or consultants. Professional trainers recommend role playing as an effective way to accomplish behavioral change and, if possible, attitudinal change.

After you decide on the appropriate program, the human resources department can set up the schedule for employee attendance and announce the schedule, purpose and content of the program in a memorandum to all employees. The memorandum should set the tone for the program and reiterate top management's position on sexual harassment.

G. Prompt and Effective Responses to Complaints and Consistent Enforcement and Implementation of the Policy

The effectiveness of a comprehensive sexual harassment policy and complaint procedure will be judged by the employer's enforcement of the policy and response to complaints about sexual harassment. The employer should therefore investigate complaints promptly and thoroughly, even if the complained-of behavior appears to be insignificant, and take the appropriate remedial action when the investigation reveals that sexual harassment has occurred.

In one recent case, Ellison v. Brady, the court found that the aggrieved employee had raised factual issues regarding whether her employer properly disciplined the co-worker who engaged in sexually harassing conduct.[33] The court noted that the remedies have to be "reasonably calculated to end the harassment" and should persuade harassers to discontinue the objectionable conduct.[34]

In this case, the co-worker repeatedly asked the employee to have lunch, pestered the employee with questions and hung around her desk and sent a note and a letter to the employee detailing his feelings for her. In response to the aggrieved employee's oral complaint, the supervisor repeatedly told the co-worker not to contact the employee and transferred him to another office. However, the employer subsequently agreed to return the offender to the original office after six months through a settlement of his union grievances. When the complainant learned that the offender would be returning to her office, she asked for a temporary transfer and filed a formal complaint, fearing that the harassment would reoccur. The offender apparently sent her another letter about his feelings after he learned about his transfer.[35]

The court faulted the employer for not taking disciplinary measures against the offender and for failing to express strong disapproval of the conduct, reprimanding the offender, placing him on probation or informing him that repetition of the conduct would result in suspension or termination.[36] The court concluded that the six month transfer of the offender was not reasonably calculated to end the harassment or assessed proportionately to the seriousness of the offense.[37] The court noted that the employer failed to consult the complainant before agreeing to return the offender to her office and that the complainant should not have to work in a less desirable location to avoid harassment.[38]

The Ellison case illustrates that employers have to impose discipline commensurate with the violation, take steps to ensure that the complained-of conduct does not reoccur, warn offenders that reoccurrences will result in further disciplinary action and avoid personnel actions that appear to punish the complainant.

IV. Conclusion

In sum, the seven point program is designed to prevent and detect sexual harassment and should improve the quality of the work environment, ultimately decrease the number of complaints and help employers defend against sexual harassment claims.

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ENDNOTES

1. 29 C.F.R. § 1604.11.
2. 29 C.F.R. § 1604.11(f).
3. Meritor Savings Bank v.Vinson, 477 U.S. 57 (1986).
4. Meritor Savings Bank, 477 U.S. at 70-71.
5. Id. at 72-73.
6. Id.
7. EEOC: Policy Guidance on Sexual Harassment, Fair Empl. Prac. Manual (BNA) 405:6681-6701 (March 19, 1990).
8. EEOC: Policy Guidance on Sexual Harassment, Fair Empl. Prac. Manual (BNA) 405:6699.
9. Id.
10. Id.
11. EEOC: Policy Guidance on Sexual Harassment, Fair Empl. Prac. Manual (BNA) 405:6699-6700.
12. Id. at 6700.
13. EEOC: Policy Guidance on Sexual Harassment, Fair Empl. Prac. Manual (BNA) 405:6701.
14. Sanchez v. City of Miami Beach, 720 F. Supp. 974, 979 (S.D. Fla. 1989).
15. Ross v. Double Diamond, Inc., 672 F.Supp. 261, 273 (N.D. Tex. 1987).
16. Waltman v. Int'l Paper Co., 875 F.2d 468, 478-79 (5th Cir. 1989); Yates v. Avco Corp., 819 F.2d 630, 635-36 (6th Cir. 1987).
17. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).
18. Brooms v. Regal Tube Co., 881 F.2d 412, 421 (7th Cir. 1989).
19. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).
20. Id. at 1510
21. Robinson, 760 F. Supp. at 1510.
22. Id. at 1517-18.
23. Id. at 1518-19.
24. Id.
25. Robinson, 760 F. Supp. at 1518-19, 1530-32.
26. Id. at 1530-31.
27. Id. at 1530.
28. Id. at 1537-38.
29. Robinson, 760 F. Supp. at 1541-46.
30. Robinson, 760 F. Supp. at 1507.
31. Robinson, 760 F. Supp. at 1519-20.
32. Robinson, 760 F. Supp. at 1505.
33. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).
34. Ellison, 924 F.2d at 883.
35. Id. at 873-74.
36. Ellison, 924 F.2d at 882-83.
37. Id. at 883.
38. Id. at 883.

FACULTY UNIONS RESPOND TO SEXUAL HARASSMENT

The issue of unequal treatment of male and female faculty in higher education institutions with regard to appointment, tenure, promotion and other terms and conditions of employment has long been a concern in academic circles. Federal equal employment legislation and faculty union activism in the late 1960s and early 1970s remedied some of the equity issues of the past. Yet with insufficient progress made toward eliminating discrimin-ation, sexual harassment -- a form of sex discrimination -- continues to be addressed by faculty unions represent-ing the interests of American college and university professors.

The **American Association of University Professors** (AAUP), the **American Federation of Teachers** (AFT) and the **National Education Association** (NEA) continue to publish articles, issue statements and provide counsel on how to recognize, remedy and prevent sexual harassment in higher education.

The **NEA**, in its policy statement on sexual harassment, urges its membership to work with academic institutions to "establish strong policies defining and prohibiting sexual harassment," to educate campus personnel to "recognize, understand, prevent and combat sexual harassment" and to implement internal grievance procedures that encourage the "reporting of incidents of sexual harassment" and that are designed to remedy complaints while protecting "the rights of all parties."

In an article in Thought & Action: The NEA Higher Education Journal, not only the primary effect of sexual harassment, sex discrimination, but another aspect, secondary harassment of the sexual harassment complainant in the form of retaliation and character assassination, are discussed. See, Little, Doric. "Sexual Harassment: Faculty, Student Considerations." Thought & Action: The NEA Higher Education Journal, Vol. VIII, No. 1, Spring 1992, pp. 5-12.

In the fall of 1992, **NEA** will publish a monologue entitled: "Sexual Harassment in Higher Education: Concepts and Issues." The publication includes a history of sexual harassment, provides a definition of sexual harassment and reviews recent court cases and campus policies involving sexual harassment.

The **AAUP**, in its suggested policy and procedures for handling sexual harassment complaints, addresses not only the traditional effect of sexual harassment - - sex discrimination, but also clearly exposes sexual harassment as a veiled impediment to academic freedom. The **AAUP** recommends that academic institutions adopt a policy against sexual harassment and provides the following definition:

> It is the policy of this institution that no member of the academic community may sexually harass another. Sexual advances, requests for sexual favors, and other conduct of a sexual nature constitutes sexual harassment when:
>
> 1. Any such proposals are made under circumstances implying that one's response might affect such academic or personnel decisions as are subjects to the influence of the person making such proposals; or
>
> 2. Such conduct is repeated or is so offensive that it substantially contributes to an unprofessional academic or work environment or interferes with required tasks, career opportunities or learning; or
>
> 3. Such conduct is abusive of others and creates or implies a discriminatory hostility toward their personal or professional interests because of their sex.

See, Sexual Harassment: Suggested Policy and Procedures for Handling Complaints in AAUP Policy Documents and Reports 113 (Washington, D.C.:1990).

The **AAUP** further suggests that institutions implement procedures to handle sexual harassment complaints that include corrective action or disciplinary measures for offending personnel.

Looking at another side of the sexual harassment issue in the academy, in its publication, Academe, **AAUP** noted a disturbing number of recent cases around the country in which severe penalties have been imposed on faculty members accused of sexual harassment without the safeguards of academic due process. See, Due Process in Sexual Harassment Complaints, 77 Academe 47 (Sept.- Oct. 1991).

In a recent issue of its newspaper, On Campus, the **AFT** examined the severity of sexual harassment and sex discrimination on campus. It noted that despite a decade of efforts on the part of administrations to address the problem, research shows that it is still pervasive. The article suggested that in an intermediary capacity, faculty organizations can play a strong role in settling disputes internally and in offering legal support to victims in filing formal complaints. See, On Campus, Vol. 11, No. 4 , February 1992.

The **AFT** also has issued an informational brochure that defines harassment, suggests appropriate actions to take when harassment occurs and recommends effective measures unions can take to create an environment in which sexual harassment is not tolerated. These measures include fostering greater labor-management cooperation, providing education and training programs, conducting surveys to monitor the extent of the problem, and negotiating special grievance procedures for handling disputes when they occur.

Due to the sociological and psychological dynamics of sexuality in our society and to continued imbalances of power between males and females in the workplace, persons may continue to experience unlawful sexual harassment on the job. Faculty representatives, however, continue to work to eliminate the effects of such unlawful behavior and to remedy its effects by educating their members in matters related to sexual harassment and by encouraging and providing models of sexual harassment prevention for both institutions and individuals to adopt.

Editor's Note: This article was prepared with the assistance of Ann H. Franke, Associate Secretary and Counsel to the AAUP; Christine Maitland, Coordinator of Higher Education for the NEA; and Barbara McKenna, Higher Education Editor for the AFT.

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SEXUAL HARASSMENT: PART III

EMPLOYER TORT LIABILITY FOR SEXUAL HARASSMENT AND IMPROPER INVESTIGATIONS OF SEXUAL HARASSMENT COMPLAINTS

by Richard J. Reibstein*

Editor's Note: Sexual Harassment: Part I (Newsletter, Vol. 19, No. 3) contained articles on the "definition" of sexual harassment by the United States Equal Employment Opportunity Commission ("EEOC") and the courts. EEOC guidelines on conduct of a sexual nature that may constitute sex discrimination in employment and federal and state court developing standards of legally actionable workplace sexual conduct were discussed for both "quid pro quo" and "hostile environment" type harassment.

Sexual Harassment: Part II (Newsletter, Vol. 19, No. 4) outlined methods for employers to reduce their risks of being subject to sexual harassment complaints by taking affirmative steps to eliminate sexual harassment at the workplace and commented on responses to sexual harassment by the American Association of University Professors (AAUP), the American Federation of Teachers (AFT) and the National Education Association (NEA).

Sexual Harassment: Part III (Newsletter, Vol. 20, No. 2) contains articles on the increasing tort liability associated with sexual harassment complaints and legal remedies available to sexual harassment complainants, including the new legal remedies available under the Civil Rights Act of 1991.

The articles on sexual harassment published in Vol. 20, No. 2 of the Newsletter are written from presentations by the authors at a seminar on sexual harassment held at Baruch College on February 26, 1992.

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When faced with a complaint of sexual harassment, most employers typically focus on whether the allegations of sexual harassment, if true, would violate Title VII of the Civil Rights Act of 1964. Claims of sexual harassment, however, usually involve other legal issues.

Sexual harassment at work can subject an employer to liability for a variety of workplace torts. Employer tort liability may arise not only from the harassment itself, but also from the employer's investigation of the allegations and its discipline or discharge of the alleged harasser.

Some of the torts that may be implicated by claims of sexual harassment in the workplace and improper investigations of sexual harassment claims are discussed below. Following each tort are selected inquiries that provide general information as to how liability for that tort may arise and summaries of cases in which the courts have addressed various tort claims asserted against employers involving claims of sexual harassment.

Assault and Battery - Did the alleged harasser engage in any unpermitted offensive contact with the harassee, or place the harassee in apprehension of such contact?

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In Newsome v. Cooper-Wiss, Inc., 179 Ga. App. 670, 347 S.E.2d 619 (1986), a long-term employee with a good work record served as a secretary to the employer's controller until she was terminated for "negative attitude towards company -- chronic complainer." She alleged that her boss repeatedly made sexually offensive comments and suggestions to her and "made a practice of touching her and rubbing up against her in the office." One month after the employee complained to the personnel manager, she was fired.

In the employee's action for assault and battery against the employer and its controller, the trial court granted the company's motion for summary judgment.

On appeal, the appellate court reversed. It held that even though the alleged physical touching was not to any "private area" of her body, it is for the jury to decide whether the touching and "rubbing" over a lengthy period of time "would be offensive to an ordinary person not unduly sensitive to his [or her] dignity."

In Johnson v. Ramsey County, 424 N.W.2d 800 (Minn. Ct. App. 1988), a bisexual judge hired a male employee as his court reporter. During the first several months of the reporter's employment with the judge, the two men developed a friendship and often went out together outside of work. Their racquetball games and frequent lunches were followed by unannounced visits by the judge to the employee's home.

The judge eventually made propositions and advances toward the reporter. Although the employee claimed that he tried to make it clear to his employer that he wanted to continue the friendship on a business basis only, the judge persisted in making advances toward him. The sexual overtures culminated when the judge walked past the employee in his chambers and abruptly kissed him on the lips.

The court reporter filed a lawsuit against the state and the judge, seeking damages for battery. The jury awarded the court reporter $50,000 in compensatory damages, $25,000 for future injury, and $300,000 in punitive damages.

Intentional Infliction of Emotional Distress *- Did the alleged harasser engage in a course of conduct that was "outrageous," resulting in severe emotional distress to the harassee?*

In Shrout v. Black Clawson Co., 689 F. Supp. 774 (S.D. Ohio 1988), a female data processing employee and her male supervisor engaged in a voluntary consensual relationship during her employment. After three years, she terminated the relationship but continued to work at the company for the same supervisor.

When she refused to continue the relationship, the supervisor began to harass her. He withheld performance evaluations and salary reviews, made frequent sexual remarks to the female employee, touched her intimately, left sexual materials on her desk including a book entitled "Sex Over Forty", and "looked down [her] blouse and up [her] skirt." He continued to harass her for four years, causing the employee to suffer severe emotional harm.

The data processing employee filed a lawsuit for sexual harassment. She also filed a claim against her employer and supervisor for intentional infliction of emotional distress. In a non-jury trial, the court concluded that the supervisor's harassment constituted extreme and outrageous conduct and caused emotional distress which "no reasonable woman" could endure. The court awarded the employee $75,000 for emotional harm and $50,000 in punitive damages, finding that the supervisor's campaign of harassment was malicious, and $17,000 for lost salary increases on her Title VII claim.

In Ford v. Revlon, Inc., 153 Ariz. 38, 734 P.2d 580,1 IER Cases 1571 (1987), an employee of a major cosmetics firm claimed that her manager had propositioned her and then threatened her if she did not spend the night with him. Later, at an awards picnic, after she had rejected the manager's proposition, he grabbed her and ran his hands over the intimate areas of her body. The employee reported these incidents to management but no action was taken for several months. During the interim, the harassment continued and the employee began to suffer high blood pressure, chest pains, and other symptoms of emotional distress.

The employee sued the company and the manager for intentional infliction of emotional distress and assault and battery. A jury awarded her $10,000 in compensatory damages and $100,000 in punitive damages against the employer on the intentional infliction claim, and $100 in compensatory and $1,000 in punitive damages against the manager on the assault and battery claim.

Negligent Infliction of Emotional Distress *- Did the employer engage in any conduct during the course of its investigation which it knew or should have known would cause the harassee to suffer further emotional distress or cause the alleged harasser to suffer severe emotional distress?*

In Freeman v. Kansas State Network, 719 F. Supp. 995 (D. Kan. 1989), a television news anchorwoman was informed by her manager, on the day she arrived home from the hospital with her second child, that she had been terminated from her job. Six weeks after she was notified of her termination, she became unable to lactate, which prevented her from continuing to breast-feed her new baby.

The anchorwoman filed a lawsuit against the television station for intentional and negligent infliction of emotional distress. She claimed that, as a direct result of her employer's conduct, she suffered severe mental distress and physical injury, including inability to lactate.

The court found that her employer's conduct was not so extreme or outrageous as to permit recovery for *intentional* infliction of emotional distress. The court held, however, that the anchorwoman had stated a claim for *negligent* infliction of emotional distress, based on the emotional distress caused by her inability to lactate.

False Imprisonment *- Did the alleged harasser physically or otherwise restrain or block the harassee's movement or confine the harassee at any time during the period of sexual harassment? Did any of the employer's representatives restrain or confine the alleged harasser or harassee, physically or otherwise, during the course of the investigation?*

In Foley v. Polaroid Corp., 400 Mass. 82, 508 N.E.2d 72 (1987), a computer operator employed by a major photographic products manufacturer reported to her supervisor that a head operator had sexually assaulted her. Two days later, the head operator was told by his division director that he wanted to speak with him regarding his promotion bid. When the two men reached the director's office, the head operator was introduced to the store security director and was asked if he would answer some questions. He said that he would. He was then asked numerous questions about the computer operator and was told that he would be prosecuted if he did not admit to sexually assaulting her.

During the questioning, the security director threatened the head operator with discharge, clenched his fists, and on several occasions yelled at the head operator to sit back down. The questioning continued for approximately four hours.

Based on the computer operator's complaint, the employer filed criminal charges against the head operator for assault, battery and rape. After a two-week criminal trial, the jury returned a verdict of not guilty.

The head operator and his wife then filed an action against the employer alleging false imprisonment, intentional infliction of emotional distress, defamation, malicious prosecution, violation of civil rights, and loss of consortium. A jury awarded him $500,000 on his false imprisonment claim, $1.5 million on his malicious prosecution claim, and $1 million on his defamation claim. His wife was awarded a total of $2 million for loss of consortium arising out of the various claims.

On appeal, however, all of the judgments were reversed, except for the false imprisonment claim, which was remanded for a new trial. The appellate court stated that the trial court had erroneously instructed the jury that a threat of discharge during an interrogation, standing alone, could constitute false imprisonment. Accordingly, the appellate court remanded the case for a new trial on the false imprisonment claim to determine whether the evidence, considered as a whole, demonstrated that the employer's conduct and actions created an atmosphere "conducive to a threat of physical confrontation."

Invasion of Privacy *- Did the harasser ask the harassee questions about his or her sexual interests or affairs?*

In Phillips v. Smalley Maintenance Svcs., 711 F.2d 1524 (11th Cir. 1983), a female employee claimed that the company president invaded her psychological seclusion by asking her constantly about "what positions" she used with her husband and demanding that she have oral sex with him at least three times a week to maintain her job. The company president harassed her in this fashion several times a week, she alleged, and papered the windows in his office in the belief that she ultimately would submit to his demands.

The employee sued her employer and the company president in federal court, bringing a state law claim for invasion of privacy together with a Title VII action for sexual harassment. A jury awarded her $25,000 in damages. An appellate court upheld the jury award, concluding that the employee's interest in her psychological seclusion had been violated.

Defamation *- Did the employer defame the alleged harasser by communicating to others at work that he or she engaged in sexual harassment in the workplace?*

In Gonzalez v. CNA Ins. Co., 717 F.Supp. 1087 (E.D. Pa. 1989), a supervisor for an insurance company was accused by his employer of sexually harassing a female employee in his division by allegedly asking her out socially, touching her offensively, making sexual

advances and comments, and sending sexually oriented notes to employees in his division. He claimed that the accusations were false, that the employer wrongfully discharged him based on the false accusations, and that the defamatory reason for his termination was disseminated throughout the company.

The supervisor brought an action for breach of employment contract, wrongful discharge, and defamation. The employer filed a motion to dismiss the complaint as to the defamation claim, arguing that the allegedly defamatory comments enjoyed an absolute privilege. The court disagreed. It held that the employer only enjoyed a qualified privilege, which could be lost by publication of the supervisor's alleged sexual harassment to fellow employees.

Negligent Hiring *- Did the employer hire the alleged harasser despite knowledge that he or she had a prior history of sexual misconduct?*

In Gaines v. Monsanto Co., 655 S.W.2d 568 (Mo. Ct. App. 1983), a secretary was employed by a large chemical manufacturer at its corporate headquarters. A mailroom clerk who had been convicted of rape and robbery also worked for the firm. The mail clerk's duties required him to circulate among the employees at the headquarters facility, during which time he came in contact with the secretary. His assigned duties also allegedly provided him with the opportunity to learn the name and home address of the secretary. One evening, he followed her home and fatally assaulted her in her apartment. He was later convicted of murder.

The parents of the secretary brought an action against the employer for negligent hiring, and the employer made a motion to dismiss. The lower court granted the motion and dismissed the action. On appeal, however, an appellate court reversed. It held that where a plaintiff can show that the employer knew or should have known of an employee's dangerous proclivities, the employer may be liable for negligent hiring if its negligence in hiring the employee was the proximate cause of the injury and was foreseeable.

Negligent Retention *- Did the employer receive complaints of sexual harassment about the alleged harasser yet retain him or her? Did the employer fail to train its supervisory and nonsupervisory employees not to engage in sexual harassment or negligently fail to supervise its workforce so as to prevent sexual harassment?*

In Brown v. Burlington Indus., Inc., 93 N.C. App. 431, 378 S.E.2d 232 (1989), review dismissed, 326 N.C. 356, 388 S.E.2d 769 (1990), a manager of a textile plant repeatedly made sexually suggestive remarks and gestures toward a female supervisor over a period of two years. His lewd comments included references to male and female genitalia and his willingness to save her job from layoff if she had sex with him.

The female supervisor complained about the plant manager's misconduct to her immediate superior, a department head, but he failed to take any further action because the plant manager was his superior as well. Finally, the plant personnel manager was informed about the complaints of harassment. Senior management was then notified of the complaints and, after an investigation, the offender was involuntarily terminated.

Three months later, when the plant underwent a reduction in force, the female supervisor elected retirement with severance pay over returning to a nonsupervisory hourly position in the plant. She then filed an action against her former employer and the plant manager for negligent retention, infliction of mental and emotional distress, and invasion of privacy.

A jury returned a verdict in her favor, finding that the employer had negligently retained the plant manager in its employ. The jury found, however, that the female supervisor was *contributorily negligent*, and only awarded her $10,000 in compensatory and $50,000 in punitive damages.

The employer appealed, arguing that it could not be held liable where it promptly discharged the offending plant manager as soon as senior management learned of the sexual harassment. The appellate court disagreed. It held that after the female supervisor complained to her immediate supervisor, it was his obligation to report the allegations of sexual misconduct to higher company authorities. By failing to do so, the employer breached its duty to the plaintiff.

In Cox v. Brazo, 165 Ga. App. 888, 303 S.E.2d 71, aff'd, 251 Ga. 491, 307 S.E.2d 474 (1983), a counter operator in a fast-food restaurant was subjected to lewd and obscene comments by her supervisor, who repeatedly made sexual advances toward her, placed his hands on the private parts of her body, and, on one occasion, dropped his trousers in her presence. These advances were repelled by the counter operator, but the improprieties continued until she resigned. The employee alleged that incidents of similar misconduct by the supervisor previously had been reported to the employer.

The counter operator brought an action against the employer and her supervisor for negligent retention and assault. The defendant's motion for summary judgment was granted by the trial court, which held that the counter operator's claims were barred by the state workers' compensation law.

On appeal, however, an appellate court reversed. The appellate court held that although the counter operator could not maintain her claim of assault against the employer, she could proceed with her claim of negligent retention. The court concluded that an employer may be liable for negligent retention if it retained the supervisor in a supervisory position "with notice of his proclivity to engage in sexually offensive conduct directed against female employees."

Summary

The above cases illustrate that employers can be faced with legal issues that go beyond a charge of sexual harassment when offensive conduct of a sexual nature occurs at the workplace. Employers should be cautioned to implement programs to prevent sexual harassment, to promptly and thoroughly investigate all complaints of sexual harassment, to be prudent in conducting their investigations and not to disclose any information to any person who does not have a need to know about the allegations or the details or conclusions of the investigation.

The cases and materials included in this article were condensed from a forthcoming book entitled *Employer's Guide to Workplace Torts*. Copyright 1992, Bureau of National Affairs. The book is expected to be published in mid-1992. Special permission to print these excerpts was granted by the Bureau of National Affairs to Richard J. Reibstein, co-author of the book.

EMPLOYER LIABILITY, LEGAL REMEDIES FOR SEXUAL HARASSMENT COMPLAINTS AND EMPLOYER DEFENSES

by William A. Carmell*

Title VII Claims

Legal actions alleging sexual harassment against employers are most often based on the Title VII "disparate treatment" theory of liability. That is, the plaintiff alleges that he or she was treated differently (subjected to harassment) because of his or her gender. Under Title VII, a plaintiff may proceed in a sexual harassment action on the basis of either a "quid pro quo" or a "hostile environment" claim.[1]

A. "Quid Pro Quo"

In a "quid pro quo" sexual harassment claim, the plaintiff must show that his or her submission to sexual conduct was made a term or condition of employment either explicitly or implicitly, or that the rejection of a sexual demand affected a tangible aspect of his or her employment.[2]

In a "quid pro quo" sexual harassment case, employers also may be held liable for damages when employment opportunities or benefits are granted to an individual as the result of submission to a supervisor's sexual advances because the granting of benefits to an employee in exchange for his or her submission to sexual advances may be found to discriminate against other qualified employees who were not involved in the granting of sexual favors.[3] In fact, the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with enforcement of Title VII, recently enacted guidelines which specifically provide that "where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but were denied that employment opportunity or benefit."[4]

B. "Hostile Environment"

The gravamen of sexual harassment actions based on "hostile environment" claims is that the

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plaintiff must prove that the "advances" were "unwelcome." Whether the plaintiff "voluntarily" responded to sexual advances may be inconsequential if the plaintiff can prove that he or she reasonably perceived that there was no alternative response within the context of the work environment.[5]

In evaluating whether conduct was "unwelcome," however, courts may, in their discretion, consider evidence of any sexually provocative speech or dress of the plaintiff or other evidence that the plaintiff may have initiated or provoked the sexually harassing conduct alleged in the complaint.[6]

Furthermore, in a "hostile environment" case, the plaintiff is required to show that the sexual harassment was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment.[7]

Independent State Tort Claims

In addition to Title VII claims, often a plaintiff in a sexual harassment case is successful in pursuing state common law causes of action. Such causes of action may include assault, battery, invasion of privacy, intentional infliction of emotional distress and wrongful discharge in contravention of public policy.[8] In a Title VII case in which independent common law claims also are alleged, damages for injury based on common law may be awarded to the plaintiff in addition to any recovery for injury that the plaintiff may receive for his or her Title VII claim.

New Remedies Available Under the Civil Rights Act of 1991

Historically, under Title VII, courts were limited to "make-whole" or other job-specific relief such as hiring, promotion, reinstatement and/or back pay. The Civil Rights Act of 1991 (CRA 1991)[9] now permits compensatory and punitive damages to be awarded to plaintiffs in sexual harassment claims. Under CRA 1991, compensatory damages are available in cases of intentional discrimination and punitive damages may be awarded when an employer is found to have acted "with malice or with reckless indifference to federally protected rights" of the plaintiff.

Compensatory and punitive damages under CRA 1991, however, are not entirely within the discretion of the court. CRA 1991 limits plaintiff's recovery of combined compensatory and punitive damages to $50,000 in the case of an employer with 15-100 employees; $100,000 in the case of an employer with 101-200 employees; $200,000 in the case of an employer with 201-500 employees; and $300,000 in the case of an employer with more than 500 employees.

CRA 1991's limit on compensatory and punitive damages, however, does not preclude a plaintiff's recovery of traditional "make-whole" remedies under Title VII including awards of back-pay and does not effect any change of damages available to plaintiffs under common law causes of action related to their sexual harassment claims.

Employer Defenses

In order to defend against sexual harassment claims, an employer should:

Maintain a strong policy against sexual harassment;

Make sure that all employees are informed of the policy against sexual harassment;

Provide a mechanism for employees to bring sexual harassment complaints to the attention of a responsible supervisor or other member of management;

Promptly and thoroughly investigate employee complaints of sexual harassment; and

Discipline sexual harassment offenders.

In a case in which an employer can show that the plaintiff did not bring a sexual harassment complaint to the attention of his or her employer, and the conduct complained of was not so pervasive as to provide "constructive notice" of the alleged harassment to the employer, the employer may avoid liability for the claim where otherwise the employer may have been held liable if the employer "knew" or "should have known" of the illegal conduct and failed to take proper remedial action.[10]

Additionally, in a case in which an employer's response to an employee's complaint of sexual harassment was reasonably calculated to remedy the sexual harassment and to prevent further sexual harassment, the employer's good faith response may shield the employer from liability for a claim filed by the employee.[11]

In some situations, a plaintiff's claim may be barred by a statute of limitations (i.e., plaintiff did not commence the action within the time limit required by law).

Conclusion

The successful development by plaintiffs of state common law claims related to sexual harassment and the new remedies of compensatory and punitive damages available to sexual harassment complainants under CRA 1991 have increased an employer's exposure to liability for sexual harassment. In order to limit exposure to liability for sexual harassment claims, employers should follow the guidelines of the EEOC to "take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their rights to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned."[12]

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ENDNOTES

1. See, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
2. See, Jones v. Flagship Int'l, 793 F.2d 714 (5th Cir. 1986). cert. denied, 479 U.S. 1065 (1987).
3. See, Broderick v. Ruder, 685 F.Supp. 1269 (D.D.C. 1988).
4. 29 C.F.R. § 1064.11(g).
5. See, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
6. See, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); see also, Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559 (M.D. Fla. 1990); Perkins v. General Motors Corp., 709 F. Supp 1487 (W.D. Mo. 1989).
7. See, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
8. See, e.g., Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (bad faith termination); Kyriazi v. Western Electric Co., 476 F. Supp. 335 (D.N.J. 1979) (tort); Cummings v. Walsh Construction Co., 561 F. Supp. 872 (S.D. Ga. 1983) (intentional infliction of emotional distress).
9. Pub. L. No. 102-166, 105 Stat. 1071.
10. See, e.g., Kirkland v. Brinias, 53 FEP 584 (E.D. Tenn. 1989); Silverstein v. Metroplex Comm., Inc., 673 F. Supp 863 (S.D. Fla 1988); Slate v. Kingsdown, 46 FEP 1495 (M.D.N.C. 1987).
11. See, e.g., Juarez v. Ameritech Mobile Comm., Inc., 746 F. Supp. 798 (N.D. Ill. 1990); Graham v. American Airlines, 53 FEP 1390 (N.D. Okla. 1989).
12. 29 C.F.R. § 1604.11(f).

WHERE'S WANDA? -- TWENTY YEARS OF FEDERAL ANTI-DISCRIMINATION LAW

by Ann H. Franke*

Some women faculty members at a midwest university have coined the phrase "Where's Wanda" as a shorthand expression of their discontent over the paucity of women in visible institutional roles. Where are the women administrators, department chairs, and speakers at major functions? Waldo, they say, is easy to spot. Wanda is the elusive figure.

This spring marks the twentieth anniversary of the application of the major federal anti-discrimination statutes to colleges and universities. The civil rights movement of the early 1960s secured the passage of Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of sex, race, color, religion, and national origin. The Equal Pay Act, mandating equitable salaries regardless of gender, had been enacted the previous year. Neither statute, however, covered colleges and universities until 1972, when Congress comprehensively addressed discrimination in higher education. In addition to

broadening Title VII and the Equal Pay Act, it also imposed new obligations on the recipients of federal grants and contracts to redress discrimination, in Title IX of the Education Amendments of 1972.

In the last two decades, the proportions of women and minority faculty members and administrators have been rising steadily. The improved campus climate is reflected in growing numbers of women and minority students. Yet the Congressional promise of equity has yet to be fulfilled. Faculty women are paid less than their male colleagues, as documented in AAUP's comprehensive salary survey this year and every year since 1977, when AAUP began tabulating salaries by sex. Female faculty remain clustered at lower ranks; are less likely to be in positions eligible for consideration for tenure; and, if considered for tenure, are less likely to receive it. As to academic leadership, most people can readily name several women and minorities holding prominent positions in major universities. Yet these individuals are visible in part because they are exceptions to the prevailing pattern. Systematic problems persist.

The mechanisms to enforce the anti-discrimination laws have proven inadequate to the task. The three federal agencies charged with vindicating the rights of women and minorities in higher education have, many observers feel, yielded little result. Their names are weighty -- the Office of Civil Rights in the Department of Education, the Office of Federal Contract Compliance Programs in the Department of Labor, and the Equal Employment Opportunity Commission -- but their positive impact on American campuses is debatable.

In fairness, however, we should not slight the few federal enforcement efforts. EEOC brought a successful suit in the early 1980s against Framingham State College over salary discrimination. In another case, it litigated to the Supreme Court the enforcement of its subpoenas for confidential tenure files. These and other specific initiatives to remedy discrimination in the academic community appear to be more the product of energetic individual federal investigators and lawyers than an abiding sense of mission to heed Congress' 1972 admonition. The EEOC is empowered to file direct suits under the Equal Pay Act, yet in 1989, it brought only seven such actions against all employers in the country, down from seventy-nine suits in 1980. OCR and OFCCP have never, to my knowledge, used the available sanction of cutting off federal funds to a university found to have been guilty of discrimination, although the mere threat of the sanction may provide leverage for the agencies to negotiate compliance in individual cases.

The other enforcement mechanism is the individual lawsuit, brought by female and minority faculty members. This right was recently enhanced by a Supreme Court decision expanding available monetary remedies under Title IX. Yet the expense and personal toll of litigation are formidable barriers to individual enforcement. In one pending lawsuit, a sociologist who applied for tenure at Northwestern University in 1979 has yet to receive a dispositive answer to the preliminary, but fundamental, legal question of whether she filed her EEOC charge of employment discrimination within the required time period. More than a decade has passed, yet no trial has been held on her discrimination claims. Such delays and expense threaten to discourage even the most deserving plaintiffs from pursuing enforcement through private lawsuits.

In this anniversary year new attention should be directed to issues of discrimination in the academy. The status quo is not working for Wanda. The efficacy of internal college and university grievance mechanisms as a forum for redress merits new consideration. The advantages of an internal statistical study of equity in faculty salaries should be recognized. The record of the federal enforcement agencies should be held up to public scrutiny. Let us celebrate two decades of federal anti-discrimination legislation not with a sense of satisfied complacency but rather with a renewed commitment to equal opportunity.

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